No. 77-938

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD J. ANGELINI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-938

DONALD J. ANGELINI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 565 F. 2d 469.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on November 7, 1977. A petition for rehearing was denied on November 30, 1977 (Pet. App. 23). The petition for a writ of certiorari was filed on December 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a satisfactory explanation existed in this case for delays of between 9 and 38 days in sealing the recordings of court-authorized wire interceptions of petitioners' conversations.

STATUTE INVOLVED

18 U.S.C. 2518(8)(a) provides:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT

In a three-count indictment returned in February 1976 in the Northern District of Illinois, petitioners were charged with operating an illegal gambling business,

grossing more than $1.2 million per month, in violation of 18 U.S.C. (and Supp. V) 1955, conducting that illegal enterprise through the collection of unlawful debts, in violation of 18 U.S.C. 1962(c), and conspiring to violate 18 U.S.C. 1962(c), in violation of 18 U.S.C. 1962(d). The district court granted petitioners' motion to suppress recordings of telephone conversations monitored pursuant to three court-ordered wire interceptions on the ground that the government had failed to comply with the sealing requirement of 18 U.S.C. 2518(8)(a).

The court of appeals reversed the suppression order and remanded the case for further proceedings (Pet. App. 1-10).

1. The first court order, authorizing electronic surveillance for a period of 20 days, was entered on November 25, 1974, and the interceptions were terminated on December 10, 1974 (C.A. App. 26, 179-181).[1] The tapes were sealed under the direction of the court on December 24, 1974 (C.A. App. 32), nine days after the authorized period of interception expired. On December 31, 1974, a second order authorizing surveillance for 20 days (until January 20, 1975) was entered. The interceptions were terminated on January 15, 1975, and the tapes were sealed on February 27, 1975 (C.A. App. 99-102), 38 days after expiration of the authorized period of interception. The third order, also authorizing surveillance for 20 days, was entered on January 13, 1975, and the interceptions were terminated on January 15, 1975. The tapes were sealed on February 28, 1975 (C.A. App. 101-102), 26 days after the authorized interception period expired (on February 2).

---

[1] "C.A. App." refers to the government's appendix in the court of appeals, a copy of which we are lodging with the Court.

In each case the sealing of the tapes was delayed until transcripts of the intercepted conversations were completed (C.A. App. 15-18).[2] The transcripts were made primarily from duplicate tapes;[3] but the originals were retained, in a locked filing cabinet in an area to which access was limited,[4] for reference when the duplicates were difficult to understand (C.A. App. 15-18). When one of the six secretaries who worked full time typing the transcripts was unable to make out a portion of one of the tapes, she would type the word "inaudible" (C.A. App. 30-31). In attempting to fill in the inaudible segments, the supervising agent would refer first to the duplicate tape, and then, if necessary, to the original (C.A. App. 31).[5] The duplicates were generally given to the typists on the

[2]The procedure followed in transcribing the taped conversations was described in detail by the FBI agent who supervised the surveillance conducted pursuant to the first court order (C.A. App. 26-34). The supervising agent for the interceptions conducted pursuant to the second and third court orders testified that the procedure he followed was the same as that followed with respect to the earlier interceptions (C.A. App. 104-105).

[3]The tapes for each day were duplicated the following morning because the equipment used could not produce more than one original (C.A. App. 29).

[4]Only the FBI agent supervising the interceptions had a key to the filing cabinet in which the original tapes were housed (C.A. App. 28). The tapes were never removed from the cabinet by anyone other than the supervising agent (C.A. App. 33), and there was no indication of tampering with the tapes or the filing cabinet (C.A. App. 33, 109).

[5]The agent who supervised interceptions pursuant to the first court order testified that he had referred to the original tapes between 10 and 15 times and that on some of those occasions he had been able to make out portions of conversations that were inaudible on the duplicate tape (C.A. App. 32). The agent who supervised interceptions pursuant to the second and third court orders testified that he had referred to the originals between seven and ten times (C.A. App. 106).

day following the interceptions, and the transcripts were generally completed four or five days later (C.A. App. 116, 118). The three interceptions generated more than 4,000 pages of transcript—1,013 pages for the first interception period, 3,182 pages for the second, and 186 pages for the third (C.A. App. 187-188).

2. The district court found that there had been no deliberate tampering with the tapes, and that the government attorneys and agents had acted in good faith and with no intent to circumvent the statutory sealing requirement (C.A. App. 175). The court held, however, that suppression was warranted because the number of tape segments that reference to the original could have clarified was an "infinitesimal percentage" of the total. On this basis, it concluded that the delays in sealing had not been "satisfactorily explained," as Section 2518(8)(a) requires (C.A. App. 162-163).[6]

3. The court of appeals reversed, "because the Government's explanation is, in the circumstances of this case, satisfactory, and because the purposes intended by Congress were fulfilled despite the delay" (Pet. App. 5). In discussing the explanation for the delay, the court noted that "each case * * * must be judged in the context of its own facts" (Pet. App. 7); here, the fact that the delay occurred before the requirements of Section 2518(8)(a) were judicially clarified was particularly significant (*ibid.*).

[6]In the course of proceedings on the government's motion to reconsider the suppression ruling, the parties offered evidence concerning the possibility that there had been inadvertent alterations of the original tapes (see C.A. App. 221-228, 292-302). In reaffirming the suppression order, the district court declined to make a finding as to whether such alterations had occurred, on the ground that the purpose of the sealing requirement was to eliminate the need for inquiries into the possibility of actual alterations (C.A. App. 316).

The statutory purpose of assuring the integrity of the tapes was satisfied here by the district court's unchallenged finding that there had been no intentional tampering with the tapes, and by the testimony that showed conclusively that, had any inadvertent alterations occurred, they would have been readily detectable. Accordingly, the court held that there was no need to suppress all the tapes to protect the integrity of the evidence received at trial (Pet. App. 8-10).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's pretrial suppression order. That reversal puts petitioners in the same position as if the district court had ruled against them in the first instance; such a ruling would not have been subject to interlocutory appeal. See *Cobbledick* v. *United States*, 309 U.S. 323. There is similarly no justification for this Court to grant interlocutory review under the present circumstances. Three years have elapsed since the indictment was returned, and petitioners have not yet been brought to trial. Review by this Court at this time would further postpone trial by as much as a year. Moreover, review now by this Court is premature, since at trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, any of the petitioners are convicted and the convictions are affirmed, they will then be able to present to this Court at one time both their contentions relating to the reversal of the suppression order and any objections they may have to the conduct of the trial.

2. In any event, the decision of the court of appeals is correct and presents no issue requiring review by this Court. The requirement in 18 U.S.C. 2518(8)(a) that recordings of intercepted conversations must be sealed

immediately is qualified by the provision excusing the absence of a seal—and, *a fortiori*, a delay in sealing—where a "satisfactory explanation" is offered. The determination of the court of appeals that the government's explanation for the delays in sealing was "satisfactory"—a determination which, as the court recognized (Pet. App. 6-7), is primarily factual—is consistent with the manner in which other circuits have applied the sealing requirement of 18 U.S.C. 2518(8)(a) in cases involving similar delays.[7]

The Fifth Circuit has upheld a five-day delay in sealing, during which time the tape recordings were transcribed (*United States* v. *Cohen*, 530 F. 2d 43 (C.A. 5), certiorari denied, 429 U.S. 855), and a 14-day delay where "[t]he government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants" (*United States* v.

---

[7]Petitioners incorrectly suggest (Pet. App. 15) that there were substantial unexplained delays in sealing after the transcripts of the duplicate tapes were completed. But while the transcripts of the duplicate tapes were generally available four or five days after the tapes were made, that was not the end of the transcription process, for the supervising FBI agent still had to listen to the tapes and attempt to fill in the portions a secretary had found inaudible. Although it is not clear from the record when the latter process was completed as to each set of tapes, we submit that in light of the total length of the transcripts—more than 4,000 pages—the delays in this case were not unreasonable. The delay in sealing the third set of tapes, which yielded only 186 pages of transcript, was primarily because the tapes were transcribed chronologically (C.A. App. 206).

The court of appeals properly rejected the district court's reliance on the small number of references actually made to the original tapes because there was "no reason to assume that the relatively light use of the tapes could have been predicted in advance" (Pet. App. 8 n.6).

Sklaroff, 506 F. 2d 837, 840 (C.A. 5), certiorari denied, 423 U.S. 874). The Second Circuit has upheld a seven-day sealing delay that was primarily the result of the government attorney's preparations for trial (*United States* v. *Scafidi*, 564 F. 2d 633, 641 (C.A. 2), petitions for a writ of certiorari pending, Nos. 77-1001, 77-1002, 77-1003, 77-6035, 77-6165), and six and thirteen day delays caused by efforts to have the issuing judge, instead of another judge, seal the tapes (*United States* v. *Fury*, 554 F. 2d 522, 533 (C.A. 2), petition for a writ of certiorari pending, No. 76-6828; *United States* v. *Poeta*, 455 F. 2d 117 (C.A. 2), certiorari denied, 406 U.S. 948).[8]

These decisions recognize, as did the court of appeals in this case, that immediate sealing is preferable because it eliminates any doubt about the tapes' integrity and eliminates the need for an inquiry by the court, but that the proper procedure when the tapes are not immediately sealed is to require the government, as a condition of the admissibility of the tapes, to demonstrate that it has used reasonable procedures and has preserved the integrity of the tapes, so that the purpose of the immediate sealing requirement has been accomplished.[9]

The foregoing cases demonstrate that petitioners' claims of inter-circuit conflicts in the interpretation of 18 U.S.C. 2518(8)(a) are exaggerated. The court of appeals properly

---

[8]The interceptions involved in *Fury* and *Poeta* were conducted pursuant to New York law. The sealing requirement of the state statute does not differ materially from that of 18 U.S.C. 2518(8)(a). See *United States* v. *Fury*, *supra*, 554 F. 2d at 533; see also 18 U.S.C. 2516(2).

[9]Petitioners incorrectly claim (Pet. 7) that the court of appeals placed upon them the burden of proving "actual prejudice"—presumably, alteration of the tapes. Instead, the court found (Pet. App. 9) that "whichever side has the burden of persuasion, the Government's proof persuades in this case."

distinguished (Pet. App. 5) *United States* v. *Gigante*, 538 F. 2d 502 (C.A. 2), in which the delays in sealing ranged from eight months to more than a year, the government offered "no explanation whatsoever" for the delays (538 F. 2d at 504), and "haphazard procedures" were followed in handling the tapes (*id.* at 505). There can be little doubt that, if confronted with similar circumstances, the panel that decided this case would, like the court in *Gigante*, have held that suppression was proper. Conversely, in light of the Second Circuit's decisions in *Scafidi*, *Fury*, and *Poeta*, *supra*, it is not at all clear that the result in this case would have been different in the Second Circuit.[10]

In sum, where, as here, delays in sealing tape recordings of intercepted conversations are reasonable in purpose and in time, and the government has taken care to protect the integrity of the tapes, the courts of appeals have uniformly held that suppression of evidence is not

---

[10]As petitioners point out (Pet. 11), there does appear to be some divergence of opinion among the circuits as to the interplay of the sealing requirement of 18 U.S.C. 2518(8)(a) and the suppression provisions of 18 U.S.C. 2518(10)(a). In *United States* v. *Gigante*, *supra*, 538 F. 2d at 506, the Second Circuit criticized the Third Circuit's decision in *United States* v. *Falcone*, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955, because it "focused primarily upon the suppression provisions of §2518(10)(a), and paid scant attention to the independent prerequisities for admissibility delineated in §2518(8)(a)." The Seventh Circuit has expressed the view that the two provisions must be read together (Pet. App. 5). In any event, this case does not present the question whether Section 2518(10)(a) qualifies Section 2518(8)(a) with respect to the use of the recordings as evidence following a delay in sealing, because here the court of appeals found that the government's explanation for the delay was satisfactory. There was thus no violation of Section 2518(8)(a); accordingly, suppression is not required by that section, and the applicability of Section 2518(10)(a) is not in issue.

warranted.[11] Since there is no material disagreement regarding the applicable legal principles, little purpose would be served by this Court undertaking to review the Seventh Circuit's holding that the delay in sealing here was satisfactorily explained.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SIDNEY M. GLAZER,
PAUL J. BRYSH,
Attorneys.

MARCH 1978.

---

[11]In addition, we note that this issue is not likely to be of continuing importance. As we informed the Court in our brief in opposition in *Falcone* v. *United States*, Nos. 74-5500 and 74-5619, the Department of Justice has instituted special procedures to remind officials responsible for federal interceptions of their obligation to present tapes promptly for sealing. These procedures were instituted in February 1975, approximately contemporaneously with the processing of the tapes in this case.

[12]This is particularly true in light of the indication that, now that the sealing requirements have been judicially clarified, future cases may be judged by more stringent standards. See Pet. App. 7.

DOJ-1978-03